

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

<p>FILED</p> <p>September 13, 1995</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

<p>WALTER THOMPSON, Appellant, V. STATE OF TENNESSEE, Appellee.</p>	<p>) C.C.A. No. 02C01-9501-CC-00018)) Madison County)) Hon. Whit LaFon, Judge)) (Post-Conviction)))</p>
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FOR THE APPELLANT:

Jesse H. Ford, III
 Ford, Mosier & Mayo
 Attorneys at Law
 111 West Main, Lower Level
 Jackson, TN 38302

FOR THE APPELLEE:

Charles W. Burson
 Attorney General & Reporter

Michael J. Fahey, II
 Assistant Attorney General
 450 James Robertson Parkway
 Nashville, TN 37243-0493

James G. (Jerry) Woodall
 District Attorney General

James W. Thompson
 Asst. Dist. Attorney General
 Lowell Thomas State Office Building
 P.O. Box 2825
 Jackson, TN 38302-2825

OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
 Judge

OPINION

Petitioner Walter Thompson filed a petition for post-conviction relief in the Criminal Court at Madison County. After a hearing, the trial court dismissed his petition. Thompson appeals, essentially contending that the evidence preponderates against the findings of the trial court.

We affirm the judgment of the trial court.

Thompson was found guilty by a jury of aggravated rape of a minor and aggravated sexual battery of a minor. Thompson filed a post-conviction petition alleging that he received ineffective assistance of counsel at trial.

The appropriate test for determining whether counsel provided effective assistance at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1974). In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Id. at 687. In order to prove a deficient performance by counsel, a defendant must prove that counsel's representation fell below an objective standard of reasonableness. Id. at 688. A reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of professional assistance. Id. at 689. In order to prove prejudice, the defendant must show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The approach to the issue of ineffective

assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown we need not seek to determine the validity of the allegations about deficient performance. Id. at 697.

At the hearing on his petition, Thompson testified that his counsel argued the case during opening statement, argued with the judge, and failed to object when the state introduced certain lab test results. Thompson further testified that these acts "had an effect on the jury." Betty Thomas, the attorney who represented Thompson at trial, testified that, in her opening statement, she presented the facts and informed the jury of what the defense would prove. She testified that she vigorously represented Thompson which required her to raise several objections and have discussions with the judge. The trial court found that Thomas zealously represented Thompson at all phases of the trial, including opening statement. The trial court further found that the issue regarding Thomas' "continuing antagonization" of the trial court was without merit in that all objections and arguments were in an attempt to carry out her duty to zealously represent her client and protect the record.

The trial judge's findings of fact on post-conviction hearings are conclusive on appeal unless the evidence preponderates otherwise. Butler v. State, 789 S.W.2d 898, 899-900 (Tenn. 1990). This Court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the trial judge. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The burden of establishing that the evidence preponderates otherwise is on Thompson. Id. Thompson has failed to establish that the evidence preponderates against the trial court's findings. He has failed to establish how Thomas' conduct during opening statement and toward the judge prejudiced him.

With regard to the third allegation, Thomas testified that one lab test indicated that the victims tested positive for gonorrhoea and a second lab test

indicated that Thompson tested negative for gonorrhea. She testified that she did not object when the state failed to admit the evidence through the technician who administered the test because she thought that the proof was beneficial to Thompson. Thomas reasoned that the lab test could show that Thompson was not the perpetrator since he tested negative. The trial court found that Thomas's choice not to object outweighed any prejudicial effect because the lab tests were beneficial to Thompson's defense. The evidence does not preponderate against the trial court's finding.

Apparently there was a third lab test that indicated that Thompson did have gonorrhea. George Googe represented Thompson on appeal. Googe testified that on appeal he argued that the trial court erred in admitting certain test results showing that Thompson and the two victims had gonorrhea because the lab technician who conducted the tests or examined the specimens did not testify. This Court decided the issue adversely to Thompson. See State v. Thompson, C.C.A. No. 6 (Tenn. Crim. App., filed May 13, 1992). The Supreme Court denied Thompson's application for certiorari. Counsel preserved the issue on appeal; and it has been previously determined, although adversely to Thompson. See T.C.A. § 40-30-112(a) (1990).

AFFIRMED

PAUL G. SUMMERS, JUDGE

CONCUR:

WILLIAM M. BARKER, JUDGE

MARY BETH LEIBOWITZ, SPECIAL JUDGE